

SOUTH AFRICA / JUDGMENT

SIAS Joubert Constructions CC v D L Soko and Another (1778/2019) [2020] ZAMPMBHC 25 (31 December 2020)

[2020] ZAMPMBHC 25

COURT

Mbombela High Court, Mpumalanga

BEFORE

B A Mashile

CASE / FILE NUMBER

1778/2019

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REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT
OF SOUTH AFRICA
(MPUMALANGA
DIVISION, MBOMBELA)

(1)

REPORTABLE: YES / NO

(2)

OF INTEREST TO OTHER JUDGES: YES /NO

(3)

REVISED: YES

CASE NO:

1778/2019

In the matter

between:

SIAS
JOUBERT CONSTRUCTIONS CC
Applicant
and
DUMISANI
LUCKY SOKO
First
Respondent
PIERRE
FERREIRA
Second Respondent

JUDGMENT

MASHILE J:

INTRODUCTION

[1] The Applicant seeks relief in the following terms:

1.1 A declaration that the order granted by the Mbombela Magistrates Court on 13 July 2016 constitutes a final judgment on the dispute between the parties and that the Applicant has the right to proceed with execution of the warrant issued in terms of the court order;

1.2 A declaration that the Second Respondent does not have jurisdiction to arbitrate the dispute between the Applicant and the First Respondent;

1.3 That the First Respondent be ordered to pay the Applicants costs and in the event of this application being opposed by the Second Respondent, that the Second Respondent be ordered to pay the Applicants costs jointly and severally with the First Respondent.

[2] The application is opposed by the First Respondent alone. The Second Respondent has been cited merely because he might have interest in the outcome hereof. As such, no cost order is sought against him unless he opposes the application. The bases of the First Respondent's opposition are that:

2.1 The order granted by the Mbombela Magistrates Court on 13 July 2016 does not constitute a final judgment between the parties but was merely an enforcement of the adjudicators determination;

2.2 The determination by the adjudicator is not an award as defined in "the rules for the conduct of arbitration";

2.3 The application is misleading because it creates impression that the determination of the adjudicator and the subsequent enforcement of same by the court has not been executed;

2.4 The Applicant has already accepted the jurisdiction of the arbitrator in that it has participated in the first leg of the hearing where after a preliminary point with regards to condonation was determined by the arbitrator and the award was published on the 28 November 2017.

[3] For the reasons above, the First Respondent implores this Court to direct that:

3.1 The order of the Mbombela Magistrate Court dated 13 July 2016 was to enforce compliance with the adjudicators determination as the First Respondent was refusing to pay the amount due to the Applicant, as was determined by the adjudicator;

3.2 The order of the Mbombela Magistrates Court dated 13 July 2016 does not amount to a final determination of the dispute between the parties;

3.3 The second respondent has the necessary jurisdiction to arbitrate the dispute between the parties; and

3.4 Cost to be awarded against the Applicant.

FACTUAL MATRIX

- [4] The facts that gave rise to this dispute are largely common cause. That said, it is important to describe them to give a proper perspective to the matter. On 6 September 2013, the parties concluded a building contract (“The agreement”). Among other matters, the agreement provides that the Applicant will construct a dwelling on the property known as Erf 3544 Shandon Eco Reserve Estate, Nelspruit for an amount of R5 174 519.69 .
- [5] Subsequently, a dispute arose between the Applicant and the principal agent in terms of some of the items pertaining to the construction and payment thereof. The Applicant proceeded to refer the dispute to adjudication in terms of the contract. As the representative of the contract, Eco Fusion Architect firm, duly instructed, filed a response as it was required by the adjudicator.
- [6] On 26 August 2015, the adjudicator issued a determination for payment of an amount of R324 742.12 in favour of the Applicant. Following the issuing of the adjudicator’s determination, the Applicant approached the Mbombela Magistrate’s Court on 19 May 2016 to make the adjudication determination an order of court. On 30 July 2016, the Mbombela Magistrate’s Court issued judgment which made the adjudication determination an order of court. The order meant that the Applicant could enforce the claim for payment of the amount of R324 742.12.
- [7] On 11 July 2016, the applicant issued a warrant of execution against the property of the Respondent. On 5 September 2016, the Respondent issued application for rescission of judgment and a section 62 application to stay the warrant of execution. The rescission of judgment application was dismissed by the Mbombela Magistrates Court. The application for the stay of the warrant of execution stalled execution from 4 August 2017 to 15 August 2017.
- [8] On 18 August 2017, the Respondent paid the amount determined by the adjudicator and subsequently made an order of the Magistrate’s Court. On 16 October 2017, the Applicant approached the Mbombela Magistrate Court to issue another warrant of execution in respect of the interest in the judgment amount. The Respondent also effected payment of the amount of R115 175.92. The last payment effected by the Respondent concerned the taxed party and party cost in the amount of R31 963.93.

- [9] Thereafter and on 11 April 2017, the Respondent instituted proceedings with the Association of arbitrators (Southern Africa). On 23 May 2017, the chairman of the Association of arbitrators appointed the Second Respondent as arbitrator to hear the above matter. On 1 November 2017, the arbitrator wrote to the parties. The relevant part of the letter is Paragraph 8.2, which reads:

“I am encouraging the legal representatives to reach agreement as far as they can on procedural and logistic matters in the interests of both parties and by so doing I am affording each party the fullest opportunity to be heard either by way of written submissions or at the hearing in Nelspruit before I make an award on the preliminary issues.”

- [10] Following the letter above, the Respondent, through his attorney submitted written submissions in respect of preliminary issues that were to be determined first. The Respondent also indicated that oral hearing could be dispensed with for the determination. On 17 November 2017, the Applicant, through his attorney, submitted his side of written submission in respect of preliminary issues. The letter states that:

“it is therefore our client’s instructions that the decision can be made on papers alone and that it will not be necessary for yourself to travel to Nelspruit. Should you however be of the opinion that an oral hearing be scheduled, our client is of the view that the matter can then be heard in Nelspruit and that three hours shall be reasonable in these circumstances”.

On 14 December 2017, the arbitrator issued an award in respect of preliminary issues. The award indicates that the matter could then proceed on merits.

ARGUMENTS

- [11] The Applicant asserts that resolution of this matter depends on interpretation of the Adjudication Rules read together with Clause 40 in particular, Clauses 40.3.3 and 40.3.4 of the agreement. The essence of the Applicant’s argument in this regard is that having regard to the language used, context and the purpose of the agreement, an appropriate interpretation to be assigned to Clause 40.3.4 should be that the disgruntled party ought to refer the dispute to arbitration within 10 days of receipt of the determination of the adjudicator.
- [12] The purpose of the agreement is to achieve speedy resolution to disputes between parties. The notion of leaving the period of referral of a dispute to arbitration open-ended is inimical to the advancement of the concept of speedy resolution of disputes. It would not make sense therefore that even after a year or even more a party can still make a referral of a dispute to arbitration.
- [13] A further hurdle, which the Respondent does not attempt to address is the court order that has been made by the Mbombela Magistrate’s Court. A referral of the dispute to arbitration is untenable because it will undermine the existence and operation of the court order. The Applicant concludes that court orders remain in force until set aside by another court with relevant jurisdiction. The procedure of setting aside a court order does not contemplate an

arbitrator playing any part in the process. Thus, the only practical interpretation of the court order is that it is final. Depending on the outcome hereof, the arbitrator's jurisdiction may or may not be an issue for consideration by this Court.

- [14] Conversely, the Respondent asserts that the order granted by the Mbombela Magistrates Court on 13 July 2016 did not constitute a final judgment between the parties. The court order, argues the Respondent, was purely an enforcement of the adjudicators determination. Additionally, the adjudicator's determination was not an 'award' intended in 'the rules for the conduct of arbitration'.
- [15] The Respondent adds that the application is not representative of what pertains on the ground insofar as it leaves a person with an impression that the determination of the adjudicator and the subsequent enforcement thereof by the court has not been realised. With reference to the Second Respondent's jurisdiction, the First Respondent states that the Applicant has already accepted the jurisdiction of the arbitrator. The Applicant has participated, says the First Respondent, in the first leg of the hearing following which the arbitrator made a determination on the preliminary point concerning condonation. The arbitrator's award on the condonation issue was even published on 28 November 2017.

ISSUES

- [15] The central issue in this matter is to determine whether the order of the Mbombela Magistrate's Court constitutes a final judgment. That issue, however, cannot be decided independently of the meaning of Clauses 40.3.3 and 40.3.4 of the agreement.

LEGAL POSITION

- [16] Since the resolution of this matter depends on the interpretation that one gives to Clauses 40.3.3 and 40.3.4, it will be instructive that Clause 40 of the building agreement dealing with settlement of disputes be cited in full to make reference thereto easier. It provides as follows:

“40.0 Settlement of Disputes:

40.1 Should any disagreement arise between the employer including his principal agent or agents, and the contractor arising out of or concerning this agreement or its termination, either party may give notice to the other to resolve such disagreement.

40.2 Where such disagreement is not resolved within ten (10) working days of receipt of such notice it shall be deemed to be a dispute and shall be referred by the part which gave such notice to either;

Adjudication [40.3] where the adjudication shall be conducted in terms of the edition of the JBCC rules for adjudication current at the time when the dispute was declared , or

Arbitration [40.4] where the arbitrator is to be appointed by the body selected by the parties [41.3] whose rules shall apply...

40.3.....

40.3.3 The adjudicator's decision shall be binding on the parties who shall give effect to it without delay unless and until it is subsequently revised by an arbitrator;

40.3.4 Should either party be dissatisfied with the decision given by the adjudicator, or should no decision be given within the period

set in the rules, such party may give notice of dissatisfaction to the other party and to the adjudicator within ten (10) working days of receipt of the decision or, should no decision be given, within ten (10) working days of expiry of the date by which the decision was required to be given the dissatisfaction shall refer the dispute to arbitration.”

[17] Another important provision relevant to this matter is Clause 7.2.2 of the Adjudication Rules. It provides that ‘either party may apply to court for the enforcement of the determination as a contractual obligation and to that end the parties agree to the jurisdiction of the Magistrate’s Court’. This is important in view of the fact that the Applicant had gone ahead and made the determination a court order.

[18] To the extent that this matter involves the interpretation of some of the clauses of the agreement between the parties, it is significant to refer to the leading case on interpretation of documents. This is the case of NATAL JOINT MUNICIPAL PENSION FUND v ENDUMENI MUNICIPALITY 2012 (4) SA 593 (SCA) A, which has been followed in many subsequent cases. Paragraph 18 of the case is particularly significant for purposes of this matter:

“... Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory

instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the G document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. 15 The process is objective, not subjective. A sensible B meaning is to be preferred to one that leads to insensible or unbusiness like results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross C the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', 16 read in context and having regard to the purpose of the provision and the background to the preparation and production of D the document.”

[19] The First Respondent has referred me to several cases, which deal with similar provisions as contained in the agreement in casu but not necessarily pertinent to the question that this Court is attempting to decide. The first of these cases is JORG RAINER FRESE N.O. (as and in his capacity as business rescue Practitioner of Rainbow Construction (Pty) Ltd, in business rescue/under supervision) v STEVE BIKO FOUNDATION (IT3566/98) (represented by its trustees for the time being) and Another, Case No. (00172/2016)

[2016] ZAGPJHC 358 (5 AUGUST 2016). I agree with the conclusion of the Court in the Frese case but it is critical to note that the facts were radically different notwithstanding that it also dealt with the interpretation of Clause 40.3.3.

[20] The respondent in the Frese case refused to comply with the determination of the adjudicator on the basis that it had issued a notice of dissatisfaction and as such was not obliged to perform in terms of the determination of the adjudicator. Mahalelo J went through several judgments involving Clause 40.3.3 of the agreement and came to the conclusion below:

“In the present matter, it follows therefore that the terms of the contractual provisions are perfectly clear and unambiguous, the

parties are obliged to give effect to a decision of the adjudicator without delay. The issue of the notice of dissatisfaction does not in any way detract from this obligation. The notice of dissatisfaction is necessary where the party wishes to have the decision revised; it does not affect that decision. It simply sets in motion the procedure in which the decision may be revised. The notice itself does not necessarily mean that the matter is referred to arbitration. Until revised, the decision binds the parties and they must give effect thereto without delay. The argument advanced by the respondent in this regard therefore cannot stand.”

[21] In casu the First Respondent has not only performed in terms of the determination of the adjudicator but has also not opposed the application of the Applicant to make the determination a court order. It is therefore apparent that the facts of Frese supra are different and cannot find application here. As a matter of fact, it would appear that the First Respondent was mindful that service of a notice of dissatisfaction would not detract from compliance with the determination hence his observance of it.

[22] The First Respondent has also referred this Court to case of Radon Projects v N V Properties & another (528/12) [2013] ZASCA 83 (31 May 2013). Although this case dealt with the question of jurisdiction of an arbitrator, it is relevant insofar as Nugent JA at Paragraph 8 touched on a provision similar to Clause 40.3.3 of the agreement. The following is significant on when the determination of the adjudicator becomes final and binding:

“... The effect of clause 40, properly construed, is that the first port of call for a contractor, where disagreement arises with the employer, is the principal agent.[1] The clause does not purport to limit the time within which the principal agent may be called upon to do so. But once he has been

called upon he must resolve the disagreement within ten days. If he fails to do so, or if either party disputes his decision within 20 days, a dispute is deemed to exist. If he gives a decision, and it is not disputed within that time, then his decision becomes final and binding.”

ANALYSIS

INTERPRETATION OF CLAUSES 40.3.3 AND 40.3.4

- [23] It is apparent that this matter does not raise any contentious issues on Clause 40.3.3 notwithstanding that this Court has been referred to cases dealing with it. The reference to it does not advance either party’s case because it is irrelevant to what the Court ought to decide. The conclusion is that service of a notice of dissatisfaction is necessary within 10 days if the decision of the adjudicator is to be revised. That said, the service of the notice of dissatisfaction does not undermine the obligation to comply with a determination because Clause 40.3.3 provides that ‘the adjudicator’s decision shall be binding on the parties who shall give effect to it without delay unless and until it is subsequently revised by an arbitrator’.
- [24] It must be noted that the First Respondent in this matter did not challenge the decision of the adjudicator within the stipulated period in consequence of which The Applicant perfected the determination by making it an order of court. In terms of Clause 40.3.3 failure to challenge the decision of the adjudicator renders the determination final and binding. A complicating factor here is that the determination is no longer a simple determination only but it is now an order of court. This presents opportunity to turn to the provisions of Clause 40.3.4 of the agreement.
- [25] The Applicant has strongly argued that the provisions of Clause 40.3.4 of the agreement should be read to mean that if a dissatisfied party does nothing within a period of 10 days from the date of the decision of the adjudicator, the decision will become final and binding. Opposition to that proposition is not discernable in the papers of the First Respondent. Neither was any argument against it raised in Court when the matter was argued. For that reason, I take it that the parties are agreed on the meaning that should be assigned to the clause. In any event, it would appear that such interpretation accords with the context in which the agreement was prepared, the purpose of promoting speedy resolution to disputes of this kind and the language used suggests that grammatically, the proposed interpretation is the most sensible.

COURT ORDER

[26] The determination is, legitimately or illegitimately, A COURT ORDER. It might well be that the Magistrate's Court was wrong in making it a court order but that is not an issue here. The court order remains until set aside by another Court with proper jurisdiction. The First Respondent cannot after so many months of not challenging the decision of the adjudicator and until it was made a court order want to reverse its effects. In this sense the steps that he wants to take have been superseded by events and will have to live with the consequences.

FINDINGS

[27]

- (a) determination of an adjudicator must be given effect without delay unless and until it is revised by an arbitrator;
- (b) If not revised, a determination of an adjudicator becomes final and binding upon the parties;
- (c) The determination of the adjudicator cannot be referred to arbitration after a court has made it an order;
- (d) In terms of Clause 7.2.2 of the adjudication rules, it was within the Applicant's rights to apply to the Magistrate's Court to enforce the determination as a contractual obligation;
- (e) The issue relating to the jurisdiction of the Second Respondent, as a matter of course, falls by the way side as a result of the First Respondent being barred to refer the determination that is by now an order to arbitration.

ORDER

[28] In the circumstances, I make the following order:

1. It is declared that the order of the Mbombela Magistrate's Court dated 13 July 2016 is a final judgment on the dispute between the parties;
2. The Applicant has the right to proceed with execution of the warrant issued in terms of the court order;
3. The Second Respondent does not have jurisdiction to arbitrate the dispute between the Applicant and First Respondent;
4. The First Respondent is directed to pay the Applicants costs.

B A MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email. The date and time for hand-down is deemed to be 10h00 on 31 December 2020.

APPEARANCES:

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Date of Hearing:

18 August 2020

Date of

Judgment:

31 December 2020

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